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Nos. 04-1034, 04-1384

IN THE

Supreme Court of the United States

JOHN A. RAPANOS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, *et al.*,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, MICHIGAN, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, VERMONT, WASHINGTON, AND WISCONSIN, THE DISTRICT OF COLUMBIA, THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND THE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. WETLANDS ADJACENT TO TRIBUTARIES OF NAVIGABLE WATERS ARE "WATERS OF THE UNITED STATES" UNDER THE ACT 5

A. The Experience of the States in Implementing the Act Confirms the Importance of Headwaters to Downstream "Navigable" Waters. 5

B. Requiring a Case-by-Case Determination of a Significant Effect for Each Wetland Would Undermine State and Federal Efforts to Control Water Pollution. 11

II. COVERAGE OF WETLANDS ADJACENT TO TRIBUTARIES IS NECESSARY TO MAINTAIN THE RESPECTIVE ROLES ASSIGNED BY THE ACT TO THE FEDERAL AND STATE GOVERNMENTS .. 14

Contents

Page

III. FEDERAL POWER OVER INTERSTATE COMMERCE INCLUDES THE POWER TO REGULATE DISCHARGES INTO WETLANDS ADJACENT TO NON-NAVIGABLE TRIBUTARIES 18

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Arkansas v. Oklahoma,
503 U.S. 91 (1992) 14

Baccarat Fremont Developers, LLC v. U.S. Army Corp of Eng'rs,
425 F.3d 1150 (9th Cir. 2005) 21

Chem. Waste Mgmt., Inc. v. Hunt,
504 U.S. 334 (1992) 21

City of Milwaukee v. Illinois,
451 U.S. 304 (1981) 10, 14

Cont'l T.V., Inc. v. GTE Sylvania Inc.,
433 U.S. 36 (1977) 14

EPA v. California,
426 U.S. 200 (1976) 12

Friends of the Earth v. Hintz,
800 F.2d 822, 824 (9th Cir. 1986) 21

Gonzalez v. Raich,
125 S. Ct. 2195 (2005) 19, 20, 21

Harris v. United States,
536 U.S. 545 (2002) 19

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Page

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479 U.S. 481 (1987) 10, 14, 15

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175 F.3d 422 (6th Cir. 1999) 21

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498 U.S. 103 (1990) 17

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408 F.3d 1113 (9th Cir. 2005) 21

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531 U.S. 159 (2001) 13, 21

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514 U.S. 386 (1995) 17

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77 U.S. 557 (1871) 19

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41 F.3d 117 (3d Cir. 1994) 21

Cited Authorities

Page

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209 F.3d 331 (4th Cir. 2000) 21

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363 U.S. 229 (1960) 19

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999 F.2d 719 (3d Cir. 1993) 21

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174 U.S. 690 (1899) 19-20

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133 F.3d 251 (4th Cir. 1997) 21

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Page

STATUTES

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33 C.F.R. § 328.3 ..... 5, 10

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Page

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Comments of David R. Cox, Technical Guidance Supervisor, North Carolina Wildlife Resources Commission on the ANPRM (Apr. 15, 2003) ... 12

Comments of Jan H. Reitsma, Director, Rhode Island Department of Environmental Management on the ANPRM (Apr. 16, 2003) 7

Cited Authorities

Page

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INTEREST OF AMICI CURIAE[1]

For three decades, federal and state agencies, courts, and private parties have understood the federal Clean Water Act to regulate the discharge of pollutants into "traditional" navigable waters, their non-navigable tributaries, and wetlands adjacent to these bodies.[2] These cases present the question of whether the Act covers wetlands adjacent to non-navigable tributaries of traditional navigable waters — in particular, whether section 404 of the Act requires a person to obtain a permit from the U.S. Army Corps of Engineers before discharging dredge or fill material into these wetlands. While amici curiae States, the District of Columbia, the Pennsylvania Department of Environmental Protection, and the International Association of Fish and Wildlife Agencies ("IAFWA")[3] agree that

1. Under Rule 37.4 of this Court, amici States and the District of Columbia are not required to obtain consent for the filing of this brief. The parties have consented to the filing of this brief by the Pennsylvania Department of Environmental Protection, a State agency, and the International Association of Fish and Wildlife Agencies. This brief was not written in whole or part by counsel for a party, and no one other than amici made a monetary contribution to its preparation and submission.

2. In this brief, the phrase "traditional navigable waters" refers to waters that are used (or susceptible to use) in interstate or foreign commerce, and the phrase "non-navigable" or "headwater" tributaries refers to tributaries that are not traditional navigable waters. We note, however, that traditional navigable waters include many tributaries that historically were used in commerce by, for example, fur traders or timber companies floating logs to their mills. Additionally, in some States, waters that can be used by recreational vessels like canoes are considered "navigable."

3. The IAFWA is a not-for-profit corporation whose members include the fish and wildlife agencies of all fifty States, the Commonwealth of Puerto Rico, and seven Canadian provinces and territories, as well as federal and dominion agencies having jurisdiction and responsibility for fish and wildlife resources. For over one hundred years, the Association has coordinated efforts of public agencies responsible for protection and management of North American fish and wildlife resources, and it has participated as amicus curiae in more than 20 cases.

the federal government should regulate intrastate activity only when important national interests are at stake, the filling of or other discharge of pollutants into wetlands adjacent to the nation's tributaries presents such an occasion. Amici therefore urge this Court to affirm the Sixth Circuit's decisions in these consolidated cases.

The issues presented by these cases are important to amici for three reasons. First, water flows downhill, and each of the lower 48 States has water bodies that are downstream of one or more other States. As set forth in the Appendix to this brief, every State in the continental United States has at least one traditional navigable water with a portion of that river or lake within one or more other States; many have several such waters. Because wetlands adjacent to non-navigable tributaries profoundly influence the quantity, quality, and biological integrity of downstream waters, amici strongly support federal protection for these wetlands.

Petitioners are mistaken in suggesting that the regulation of wetlands adjacent to tributaries has no bearing on the regulation of either navigable waters or their non-navigable tributaries. Wetlands generally drain into the tributaries or other waters to which they are adjacent, and the vitality of the lower reaches of watersheds is inseparably connected with the vitality of tributaries and their adjacent wetlands. The federal agencies have thus properly applied the Act to both non-navigable tributaries and to the wetlands adjacent to them for over thirty years, and a contrary interpretation would frustrate the Act's purpose of restoring and maintaining the physical, chemical and biological integrity of the nation's waters.

Second, maintaining consistency among water pollution programs throughout the nation is essential. The Clean Water Act is key to achieving this relative parity, because it creates a federal "floor" for water pollution control.

Third, over the past three decades, the States have come to rely on the Clean Water Act's core provisions and have structured their own water pollution programs accordingly. The States already play a vital role in administering parts of the Clean Water Act, but they would be heavily burdened, both administratively and financially, if forced to assume sole responsibility for regulating fill activities in wetlands adjacent to non-navigable tributaries.[4]

SUMMARY OF ARGUMENT

1. Wetlands are both practically and ecologically inseparable from the waters they abut. Because the Clean Water Act plainly covers the tributaries of traditional navigable waters, it covers the wetlands adjacent to those tributaries as well. Even if the primary goal of the Clean Water Act is viewed narrowly as merely controlling pollution in traditional navigable waters, coverage of wetlands adjacent to non-navigable tributaries is essential because a large portion of the pollution in traditional navigable waters is originally discharged into non-navigable tributaries and their adjacent wetlands.

Federal regulation is particularly important because discharges into non-navigable tributaries or their adjacent wetlands in one State often affect the waters of a downstream State. Without federal standards, the downstream State would find itself significantly hampered in protecting its own water quality and preventing harmful fluctuations in water quantity.

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4. This is true even for the two States — Michigan and New Jersey — that administer the wetland program under section 404(g) of the Act. *See* 40 C.F.R. §§ 233.70, 233.71. While these States have assumed primary authority for permitting and enforcement, federal agencies retain the right to review and veto permit applications and to bring enforcement actions. The state and federal agencies act as partners, sharing information, resources, and enforcement responsibilities. Loss of jurisdiction under the Act would not only eviscerate state section 404 programs but would leave these States without this federal backstop.

It is not enough for the Clean Water Act to be invoked only when there is proof that a specific discharge is connected to navigation or interstate movement. Even if the chances are small that any particular discharge will reach a downstream State or a traditional navigable waterway, collectively such discharges have an enormous effect — often the dominant effect — on water quality and quantity. Furthermore, a case-by-case approach would be inherently unpredictable, costly, and immensely burdensome both for public agencies and for property owners needing permits from them. For this reason, in enacting the Clean Water Act, Congress explicitly rejected the case-by-case approach that the Act's predecessor, the Rivers and Harbors Act, had taken.

2. Comprehensive coverage under the Clean Water Act is necessary to maintain the balance between federal and State authority established by the Act. The Act preempts certain common-law remedies traditionally used to address interstate water pollution, leaving the federal statutory provisions as the primary mechanism for protecting downstream States from the effects of upstream pollution. Curtailing the Act's coverage would also unfairly require States to impose disproportionate limits on in-state sources to offset unregulated upstream discharges.

Coverage of wetlands adjacent to non-navigable tributaries also gives force to a provision of the Act, section 404(g), that allows States to assume administration of the federal program for discharges of fill material into wetlands except for those wetlands that are adjacent to traditional navigable waters. If those were the only wetlands covered by the Clean Water Act, then the statutory provision would be practically meaningless.

3. Respondents' reading of the Clean Water Act does not raise any serious question about the Act's constitutionality under the Commerce Clause. The Act is a necessary and proper

regulation of activity that threatens traditional navigable waters, which are channels of interstate commerce. It likewise properly regulates a class of activity that substantially affects interstate commerce.

ARGUMENT

I. WETLANDS ADJACENT TO TRIBUTARIES OF NAVIGABLE WATERS ARE "WATERS OF THE UNITED STATES" UNDER THE ACT

The core provision of the Clean Water Act — the prohibition of "discharge of any pollutant," including fill material, without a permit, 33 U.S.C. § 1311(a) — applies to discharges into "navigable waters," which the Act defines as the "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7), (12)(A). For the last thirty years, the federal agencies charged with implementing the Act have interpreted the phrase "waters of the United States" to include "traditional" navigable waters; all tributaries of those waters, including those that are intermittent and ephemeral; and wetlands "adjacent" to traditional navigable waters or their tributaries.[5] 33 C.F.R. § 328.3(a)(1),(5),(7) (Corps definition); 40 C.F.R. § 230.3(s)(1),(5),(7) (EPA definition); 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975). State agencies and courts have done the same. This longstanding interpretation is correct and should be affirmed.

A. The Experience of the States in Implementing the Act Confirms the Importance of Headwaters to Downstream "Navigable" Waters.

These cases are not about the regulation of hydrologically isolated wetlands, as petitioners suggest. The wetlands at issue in these cases are those that this Court has recognized are

5. The Corps defines intermittent streams as those that have "flowing water during certain times of the year . . .," and ephemeral streams as those with "flowing water only during, and for a short duration after, precipitation events in a typical year." 65 Fed. Reg. 12,818, 12,897-98 (Mar. 9, 2000).

"inseparably bound up" with the open waters to which they are adjacent. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985). Wetlands tend to drain into adjacent waters, either constantly or intermittently, so that discharges into the wetlands are effectively the same as discharges into the waters. *Id.* The Clean Water Act would be eviscerated if it applied only to tributaries of navigable waters and not to the wetlands adjacent to those tributaries.

Coverage under the Act of wetlands adjacent to tributaries is essential because those waters strongly influence the quantity and quality of water entering traditional navigable waters. They retain sediment that otherwise would be transported downstream, where it might block the flow of water or release other pollutants.[6] They also play a major role in the regulation of downstream water chemistry, as, for example, by transforming excess nitrate leaking from septic systems and agricultural fields into harmless gases through the natural process of denitrification.[7] And headwater wetlands also reduce flood peaks

6. *See, e.g.*, Thomas F. Waters, *Sediment in Streams: Sources, Biological Effects and Control* (1995); Cliff R. Hupp & David E. Bazemore, "Spatial and Temporal Aspects of Sediment Deposition in West Tennessee Forested Wetlands," 141 J. Hydrology 179 (1993); Mark R. Walbridge & Judith P. Struthers, "Phosphorus Retention in Non-Tidal Palustrine Forested Wetlands of the Mid-Atlantic Region," 13 Wetlands 84 (1993); Carol A. Johnston, "Sediment and Nutrient Retention by Freshwater Wetlands: Effects on Surface Water Quality," 21 Critical Revs. Envtl. Control 491 (1991).

7. *See, e.g.*, Bruce J. Peterson et al., "Control of Nitrogen Export from Watersheds by Headwater Streams," 292 Sci. 86 (2001) (small headwater stream in Michigan and others elsewhere throughout the United States); Lars O. Hedin et al., "Thermodynamic Constraints on Nitrogen Transformations and Other Biogeochemical Processes at Soil-Stream Interfaces," 79 Ecology 684 (1998) (small Michigan stream); Robert M. Holmes et al., "Denitrification in a Nitrogen-Limited Stream Ecosystem," 33 Biogeochemistry 125 (1996) (small Arizona stream); Peter M. Groffman et al., "Nitrate Dynamics in Riparian Forests: Microbial Studies," 21 J. Envtl. Quality 666 (1992) (small Rhode Island streams).

in navigable rivers and streams by temporarily storing water and gradually releasing it to maintain normal flow.[8]

The States' own studies confirm the importance of tributaries and their adjacent wetlands for downstream water quality. For example, an analysis of Lake Champlain by Vermont and New York concluded that of the estimated 647 metric tons of phosphorus (which tends to deplete dissolved oxygen and thereby create "dead zones" in which most marine life cannot survive) entering the lake from all sources each year, 573 tons — 89% — entered the lake through its tributaries, most of which are non-navigable and intrastate.[9] Similarly, Rhode Island's studies have shown that "small, non-navigable tributary streams [are] important contributors of pollutant loadings in nearly every case." Comments of Jan H. Reitsma, Director, Rhode Island Department of Environmental Management on the ANPRM 2 (Apr. 16, 2003).[10]

The States' studies also confirm that this is an interstate issue, because pollutants discharged in one State may contribute significantly to the impairment of water quality in a traditional navigable water in another State. For example, a study of Long Island Sound by New York and Connecticut found that 13.5% of the estimated 100,436 tons of nitrogen entering the Sound

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8. *See, e.g.*, Mark M. Brinson et al., U.S. Army Corps of Engineers, *A Guidebook for Application of Hydrogeomorphic Assessments to Riverine Wetlands* 15, 21, 24, 27 (1995); National Research Council, *Wetlands: Characteristics and Boundaries* 34-5, 40-1 (1995).

9. Vt. Dep't of Envtl. Conservation & N.Y. State Dep't of Envtl. Conservation, *A Phosphorus Budget, Model, and Load Reduction Strategy for Lake Champlain* 95 tbl. 28 (1997), http://www.anr.state.vt.us/dec/waterq/lakes/docs/lp_lcdfsfinalreport.pdf.

10. These comments, as well as other States' comments cited in this brief, are available at http://www.asiwpca.org/statecomments.htm.

each year came from headwater tributary watersheds north of Connecticut.[11]

The biological links between headwaters and traditional navigable waters, and the connection between these waters' biological health and their role in interstate commerce, are illustrated by the life cycles of anadromous fish — those that live at sea but spawn in freshwater — such as the pacific salmon and steelhead trout of California and the Northwest and the alewifes of the East Coast. These fish need tributaries with specific water quantity and quality in which to spawn and rear their young. The salmon and trout of the Great Lakes — which as adults live in the lakes but spawn and live as fry in the tributaries— have similar requirements. The presence of these fish in the nation's waterways directly or indirectly supports commercial and recreational activities that generate at least hundreds of millions of dollars of economic activity annually.[12]

Coverage of headwaters is also consistent with the long history of federal regulation in this area. Congress recognized the necessity of regulating tributaries to protect traditional navigable waters under Section 13 of the Rivers and Harbors

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11. N.Y. State Dep't of Envtl. Conservation & Conn. Dep't of Envtl. Prot., *A Total Maximum Daily Load Analysis To Achieve Water Quality Standards for Dissolved Oxygen in Long Island Sound* 16-18 (Dec. 2000), *available at* http://www.dec.state.ny.us/website/dow/tmdllis.pdf.

12. *See, e.g.*, U.S. EPA, "Great Lakes Strategy 2002 - A Plan for the New Millennium," http://www.epa.gov.glnpo/gls (last visited Jan. 12, 2006) (the annual value of the commercial and sport fishery of the Great Lakes is estimated at over $4.5 billion); U.S. Fish & Wildlife Service & U.S. Census Bureau, *2001 National Survey of Fishing, Hunting, and Wildlife - Associated Recreation* 58, tbl.4 (2002) (33% of Great Lakes recreational fishing targeted salmon or steelhead trout); U.S. Natl Marine Fisheries Service, *Fisheries of the United States 2004* 1-3 (2005) (listing the value of the 2004 commercial harvest for pacific salmon, alewife, striped bass, and bluefish (the last two of which prey on alewifes) at $287 million).

Act of 1899 (sometimes also called the Refuse Act), ch. 425, § 13, 30 Stat. 1121, 1152 (codified at 33 U.S.C. § 407). Among other things, this provision prohibited certain discharges "into any tributary of any navigable water" and even "on the bank of any tributary of any navigable water." 33 U.S.C. § 407. Congress intended the Clean Water Act's broader language to cover more than the Rivers and Harbors Act did, not less. *See* S. Rep. No. 92-414, at 70 (1971) (explaining that "the Refuse Act authority has significant gaps . . . that render it seriously inadequate as a means of implementation of a water pollution control program"), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3736. As Congress stated, the Clean Water Act is meant to continue federal coverage of non-navigable tributaries of traditional navigable waters. *Id.* at 77 (noting that the broad definition of "navigable waters" is intended to include "tributaries thereof"), *reprinted in* 1972 U.S.C.C.A.N. at 3742.

Moreover, the headwaters are vital in their own right. For example, the EPA found that non-navigable tributaries in the mid-Atlantic region contain 558 separate sources of drinking water and serve a population of 5.2 million.[13] Similarly, certain non-navigable bodies of water and wetlands in the New York City Water Supply Watershed have been designated Critical Resource Waters because of their importance in assuring the purity of the city's water.[14]

Non-navigable tributaries comprise at least 75% of the nation's stream and river miles, *see* Judy L. Meyer et al., *Where*

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13. *See* Charles A. Rhodes, Jr., *Findings in the Mid-Atlantic Region Concerning Implications for Clean Water Act Jurisdiction for Various Interpretations of SWANCC*, at 10 (2005), *available at* http://www.aswm.org/calendar/legal/rhodes.pdf.

14. Corps of Engineers, New York District, *Public Notice: Regional Conditions for Nationwide Permits and Designation of Critical Resource Waters*, at 2 (May 21, 2002), *available at* http://www.nan.usace.army.mil/business/buslinks/regulat/pnotices/nwp_pn.pdf.

Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands 6-7 (2003), and it is these tributaries that adjacent wetlands mostly abut. The Delaware Department of Natural Resources and Environmental Control has determined that fewer than 10% of the freshwater wetlands in that State are directly adjacent to traditional navigable waters.[15] Similarly, the Tennessee Wildlife Resources Agency has found that the majority of the State's wetlands are not adjacent to navigable streams.[16] The predominance of non-navigable tributaries and their adjacent wetlands led the federal agencies to reasonably conclude that they are covered by the Act, which this Court has repeatedly characterized as comprehensive, *e.g.*, *City of Milwaukee v. Illinois*, 451 U.S. 304, 317-19 (1981), and has described as covering "virtually all surface water in the country," *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486, 492 (1987). *See* 33 C.F.R. § 328.3(a)(1),(5),(7) (Corps definition); 40 C.F.R. § 230.3(s)(1),(5),(7) (EPA definition).

The contrasting interpretation of the Act urged by Amici American Petroleum Institute ("API") and National Association of Homebuilders ("Homebuilders") has nothing to recommend it. They argue that decades-old drainage ditches, such as the county drainages next to the Carabell wetland, and other non-navigable tributaries that drain several or many areas ought to be regarded not as tributaries but as "point sources"— *i.e.*, original sources of discharges — that require permits under the Act. Homebuilders Br. at 2-12; API Br. at 16-18.[17] If true,

15. Comments of the Delaware Department of Natural Resources and Environmental Control (Apr. 16, 2003), at 2.

16. Comments of the Tennessee Wildlife Resources Agency on the ANPRM (Feb. 26, 2003), at 2.

17. Homebuilders mistakenly claims that the Sutherland-Oemig drain at issue in *Carabell* is treated as a point source rather than a tributary under the relevant permit. Homebuilders Br. at 8-9. In fact, the permit authorizes the discharge of storm water *to* the drain, which indicates that the drain is being treated as a tributary, not a point source. Homebuilders Br. at App. 3b, 6b.

whenever a tributary merges with another stream it could be called a discharge point. But such a reading has no support in the structure of the Act, which aims to control pollution at its source rather than permitting pollutants to enter the water and dealing with them at some downstream location. *See* S. Rep. No. 92-414, at 77 (1972) ("[I]t is essential that discharge of pollutants be controlled at the source."). That reading of the statute would also impose enormous new burdens on landowners who do not add pollution to water but happen to own the site at which a tributary flows into navigable water, and who would have to obtain a permit for every single drainage ditch and non-navigable tributary.[18]

B. Requiring a Case-by-Case Determination of a Significant Effect for Each Wetland Would Undermine State and Federal Efforts to Control Water Pollution.

Perhaps recognizing the importance of wetlands adjacent to headwater tributaries, some of petitioners' amici (including the States of Alaska and Utah) argue that the Act can be invoked only after a case-by-case assessment of whether any particular wetland "significantly affect[s]" the flow or condition of a traditional navigable waterway. Alaska Br. at 10. This

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18. Moreover, since many state laws do not distinguish between man-made drains and natural streams, treating them differently under federal law would unnecessarily complicate the administration of state programs. *See, e.g.*, Mich. Comp. Laws. § 324.30101(f) (defining "[i]nland lake or stream" to include "a river, stream, or creek which may or may not be serving as a drain" and "any other body of water that has definite banks, a bed, and visible evidence of a continued flow or continued occurrence of water"); *id.* § 324.3101(g) (defining "[w]aters of the state" as "groundwaters, lakes, rivers, and streams and all other watercourses and waters . . . within the jurisdiction of this state"); N.Y. Environmental Conservation Law § 17-0105(2) (defining "waters of the state" to include natural or artificial water bodies); S.C. Code Ann. § 48-1-10(2) (same).

unworkable proposal is contrary to the history and structure of the Act.

Requiring wetland-by-wetland analysis would make administration of the Clean Water Act cumbersome and wildly unpredictable.[19] Without extensive studies, it is often unclear whether a particular wetland "significantly affects" traditional navigable waters, and thus whether state or federal authorities have jurisdiction. Property owners would be uncertain whether they need a permit and, if so, from which agency they could obtain one. And because discharges often have significant downstream effects only in the aggregate, a wetland-specific analysis will be largely meaningless.

That is why Congress in the Clean Water Act squarely rejected the effects-based approach of earlier federal water-pollution-control laws that were widely regarded as having failed. *See, e.g.*, *EPA v. California*, 426 U.S. 200, 202-06 (1976) (discussing the categorical approach to controlling water pollution adopted in the 1972 amendments in contrast to the ambient water-quality-based discharge-by-discharge approach taken by the Federal Water Pollution Control Act before 1972); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1042-43 (D.C. Cir. 1978) (discussing the scientific and administrative difficulties of tying water pollution controls to discharge-by-discharge effects). This Court likewise rejected a wetland-by-wetland approach to Clean Water Act jurisdiction, noting that while "it may well be that not every adjacent wetland is of great

19. *See* Comments of David R. Cox, Technical Guidance Supervisor, North Carolina Wildlife Resources Commission on the ANPRM 5 (Apr. 15, 2003) ("Without this type of presumptive foundation for jurisdiction, a wetland-by wetland demonstration of hydrologic relationships would make enforcement of the [Act] impossible."); Comments of Jeffrey R. Vonk, Director, Iowa Department of Natural Resources on the ANPRM (Mar. 31, 2003), at 3 ("The burden of requiring regulatory agencies to make wetland by wetland determinations based on physical linkages to streams is unreasonable and will make CWA regulation ineffective.").

importance to the environment of adjoining bodies of water," the Corps nonetheless properly asserted jurisdiction over all such wetlands since they often have a significant effect on adjacent bodies of open water. *Riverside Bayview*, 474 U.S. at 135 n.9. As the Court explained, if a particular wetland turns out not to be important to the adjacent waterway, "the Corps may always allow development of the wetland for other uses simply by issuing a permit." *Id.*

The same is true here: If a wetland adjacent to a non-navigable tributary in fact has little ecological value and discharges into it are unlikely to affect downstream waters, the appropriate agency may permit the discharges. But the proper place for this inquiry is as part of the decision whether to issue a particular permit, not the decision whether the wetland is covered by the statute in the first place. *See* 33 U.S.C. § 1344(e)(1) (authorizing dredge and fill discharge permits on a state, regional, or nationwide basis for activities that alone and cumulatively have only minimal adverse effect on the environment).

Nothing in this Court's decision in *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), requires a wetland-by-wetland analysis of connection to traditional navigable water to determine jurisdiction under the Act. *SWANCC* merely held that the Act does not cover non-navigable, intrastate waters just because those waters are used by migratory birds. 531 U.S. at 162, 174. But flooded mine pits whose sole connection to traditional navigable waters is their use by migratory birds are a far cry from wetlands that are adjacent to tributaries flowing into traditional navigable waters. As a general matter, these wetlands affect the quantity, quality, and biological integrity of downstream traditional navigable waters, and for that reason are squarely covered by the Act without the need for a wetland-by-wetland analysis. *See Riverside Bayview*, 474 U.S. at 135 n.9 ("If it is reasonable for

the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand."); *see also Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977) (noting that general rules "tend to provide guidance" and "minimize the burdens on litigants and the judicial system").

II. COVERAGE OF WETLANDS ADJACENT TO TRIBUTARIES IS NECESSARY TO MAINTAIN THE RESPECTIVE ROLES ASSIGNED BY THE ACT TO THE FEDERAL AND STATE GOVERNMENTS

Construing the Clean Water Act as narrowly as petitioners and amici urge would deprive the Act of the broad coverage that Congress intended. The nation's system of waters, though broad in geographic scope, is highly interconnected. Pollutants discharged into the Mississippi River in Minnesota can affect the waters of nine downstream States as far away as the Gulf of Mexico. *See Ouellette*, 479 U.S. at 497 n.17; *see also Arkansas v. Oklahoma*, 503 U.S. 91 (1992) (considering the effect of effluent discharged into an unnamed tributary in Arkansas connected through a series of three creeks before entering the Illinois River, 22 miles upstream of the Arkansas-Oklahoma border).

While the Act gave downstream States "a strong voice in regulating their own pollution," it provided them with only an advisory role in regulating pollution that originates outside their borders. *Ouellette*, 479 U.S. at 490. A State may not establish a separate permit system to regulate out-of-state sources. *Id.* at 491. And this Court has held that the Act's comprehensive regulation of upstream sources preempts traditional common-law remedies that downstream States might otherwise have for upstream sources of pollution. *See City of Milwaukee*, 451 U.S. at 317 (federal common law preempted); *Ouellette*, 479 U.S. at 494 (common law of an affected State preempted). The Court's preemption decisions reflect the fact that the Clean Water Act's core provisions are the primary

bulwark protecting downstream States from upstream water pollution. Given the Clean Water Act's focus on controlling pollution at its source, *see* 33 U.S.C. § 1251(a), the broad geographic interconnection among waters, and the limited power of downstream States to control pollution sources in upstream states, the Act must be construed to protect waters in downstream states by "expansively . . . cover[ing] waters that are not navigable in the traditional sense," *Ouellette*, 479 U.S. at 486 n.6, but that are hydrologically connected with downstream waters, even if only occasionally.

Petitioners' narrow view of the Act, which excluded these waters from federal regulation, would unavoidably impose additional, unnecessary burdens on downstream States and their citizens. Each such State, when dealing with waters within state boundaries that fail water quality standards mandated by the Clean Water Act, would be forced to impose disproportionate limits on in-state sources to offset pollution from out-of-state sources that the State cannot regulate.[20] This could produce unfair differences not only between dischargers in different States but also between dischargers in different areas of a single State, since those areas downstream of other States might have to be regulated more strictly than other areas — all contrary to the primacy of evenhanded discharge standards under the Act. *See* Oliver A. Houck, *The Clean Water Act TMDL Program: Law, Policy, and Implementation*, 23-24 (2d ed. 2002) (standards based on the quality of receiving water are relegated to a backup role where technology-based standards are insufficient).

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20. *See* Comments of Larry D. McKinney, Senior Director, Aquatic Resources, Texas Parks and Wildlife Department on the ANPRM 7 (Apr. 15, 2003) (limiting Clean Water Act coverage to traditional navigable waters "would most likely result in more restrictive discharge permit limits to those discharging into the navigable waters to compensate for those dischargers who would no longer be required to meet standards set by" the Act); Comments of Lori F. Kaplan, Commissioner, Indiana Department of Environmental Management 11 (April 16, 2003) (same).

Additionally, over the last thirty years, the States have relied on broad Clean Water Act coverage to protect the health of their citizens and environments. Indeed, federal and state agencies for over 100 years have recognized federal jurisdiction over non-navigable tributaries. *See* Rivers and Harbors Act of 1899, ch. 425, § 13, 30 Stat. 1121, 1152 (codified at 33 U.S.C. § 407) (prohibiting certain discharges into tributaries of navigable waters or onto their banks). Many States rely on the Act as the sole source of legal protection for adjacent wetlands. Other States rely in part on the federal law and resources, augmenting them with state laws and resources, including in some instances state water-pollution-control laws.[21] If federal jurisdiction under the Clean Water Act were restricted as petitioners propose, many States will have to develop new regulatory programs to fill the void. At a minimum, this would take time and money, and even when operational, the substitute for the federal program would be a messy patchwork of conflicting regulatory requirements among the States.

Reading the Clean Water Act as covering wetlands adjacent to non-navigable tributaries also is necessary to give meaning to a provision of the Act that retains federal authority over wetlands adjacent to traditional navigable waters while yielding authority to the States to regulate discharges to other waters. In 1977, after the EPA and the Corps had adopted regulations establishing the Act's coverage of wetlands adjacent to tributaries, Congress amended the Act to authorize States to assume administration of the federal section 404 permit program through their own permit programs. 33 U.S.C. § 1344(g)(1) (section 404(g)(1) of the Act). Practically speaking, the vast majority of permits issued under these programs concern wetlands rather than open waters. The 1977 amendments reflect

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21. Only twenty states have specific wetland protection statutes. They are Connecticut, Florida, Indiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wisconsin.

Congress's decision not to remove wetlands adjacent to tributaries from the Act's coverage, but instead to provide additional procedures to reduce the regulatory burden on the Corps, and to give States a greater role in implementing the wetlands program if they want one. *See Riverside Bayview*, 474 U.S. at 135-39 (discussing the focus on wetlands in the 1977 amendments); *see also* Lance D. Wood, "Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands," 34 Envtl. L. Rep. 10,187, 10,214-15 (2004) (discussing the 1977 amendments to section 404).

Under this provision, however, the States may not administer the section 404 program for "traditional" navigable waters, waters that could be improved to sustain navigation, and "wetlands adjacent" to those waters. *See* 33 U.S.C. § 1344(g)(1).[22] This means two things. First, this section clearly contemplates coverage of wetlands and improvable tributaries, not just traditional navigable waters. Second, if the Act covered only wetlands adjacent to traditional navigable waters, as Petitioners contend, this statutory provision would be practically meaningless, since there would be no wetlands covered by the Act over which States could assume permitting authority. When Congress amends a statute, though, the Court "presume[s] it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995); *see also Moskal v. United States*, 498 U.S. 103, 109-111 (1990) (Court must construe a

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22. In Michigan's case, after approval of its program the State entered into a Memorandum of Understanding with the Corps that defined the extent of traditional navigable waters. The Corps estimates that less than 500 miles of Michigan's approximately 54,000 miles of river and streams are "traditional" navigable waters. *See* Memorandum from Diana Klemans, Chief, Surface Water Assessment Section, Water Bureau, Mich. Dep't of Envtl. Quality, to S. Peter Manning, Dep't of Attorney General (Jan. 10, 2006), *available at* http://www.deq.state.mi.us/documents/deqexecissuestowatchRapanosmemo2006.pdf.

statute to give effect, if possible, to every provision). The natural conclusion is that the Clean Water Act covers wetlands adjacent to non-navigable tributaries, and that Congress intended to create a process under which the States can assume primary responsibility for fill operations in these wetlands.

Finally, and contrary to the unsupported assertions of the *Rapanos* petitioners and some of their amici, applying the Act to wetlands adjacent to non-navigable tributaries does not unduly intrude on the traditional and primary power of States and their municipal subdivisions over land and water use. Brief for Petitioners in No. 04-1034 at 28-31; Brief of Amici Curiae Foundation for Environmental and Economic Progress, et. al., at 14-19. This argument, which is advanced mostly by the leading commercial interests whose activities are subject to regulation under the Act rather than by States or municipalities themselves, fails to show that a handful of permit denials by the Corps constitutes a significant conflict. The argument also fails to recognize the benefits that a consistent national program provides to the States. Congress has given the States a major role in implementing the Act's programs and goals, and has left the States and their subdivisions ample room to exercise control over land and water use. At the same time, however, Congress learned from experience that only a comprehensive approach to water-pollution regulation at the federal level can achieve the Nation's hopes for clean water.

III. FEDERAL POWER OVER INTERSTATE COMMERCE INCLUDES THE POWER TO REGULATE DISCHARGES INTO WETLANDS ADJACENT TO NON-NAVIGABLE TRIBUTARIES

Construing the Clean Water Act to cover wetlands adjacent to non-navigable tributaries does not raise any serious — or even close — constitutional questions. To the contrary, the Clean Water Act falls comfortably within the federal commerce power. U.S. Const. art. I, § 8. Under this provision and the Constitution's "necessary and proper" clause, the federal government may

regulate purely intrastate activities that threaten the use of a channel of interstate commerce or a class of activities that in the aggregate substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558 (1995); *see also Gonzalez v. Raich*, 125 S. Ct. 2195, 2216 (2005) (Scalia, J., concurring) "([T]he authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce.") The Clean Water Act can be upheld under both of these categories. More importantly, the constitutional question is not a close call. There is thus no need for this Court to adopt a limiting construction of the Clean Water Act under the canon of constitutional avoidance. *See Harris v. United States*, 536 U.S. 545, 555 (2002) (explaining that the canon applies "only when there are serious concerns about the statute's constitutionality").

Because traditional navigable waters are an important channel of interstate commerce, the Commerce Clause encompasses "such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States," including legislation that "requir[es] the removal of obstructions to their use." *The Daniel Ball*, 77 U.S. 557, 564 (1871). Moreover, as noted above, many waters that are not "traditionally" navigable are navigable in fact by recreational vessels, which themselves engage in an important activity in interstate commerce. The Commerce Clause also allows the federal government to regulate activities *outside* of the traditional navigable waters — for example, in non-navigable tributaries — that potentially threaten navigation *within* those waters. *See United States v. Grand River Dam Auth.*, 363 U.S. 229, 232 (1960); *United States v. Rio Grande Dam & Irrigation Co.*, 174

U.S. 690, 709-10 (1899); *see also Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525 (1941) ("There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries."). As explained above, discharges into wetlands adjacent to non-navigable tributaries may impair navigation in a number of ways: by causing flooding downstream, by allowing silt to run off and accumulate in a downstream waterway, or (if the discharge contains toxic chemicals that flow downstream) by making use of the waterway dangerous. The federal government rationally may conclude that pollution discharged into these wetlands substantially affects downstream traditional navigable waters.

Nor is federal authority under the Commerce Clause limited by any requirement that the Clean Water Act cover only those specific discharges that by themselves can be proven to substantially affect traditional navigable waters. Even when the chances that any particular discharge will reach a traditional navigable water are low, it is overwhelmingly likely that some of the pollutants discharged into wetlands adjacent to headwater tributaries will be swept downstream into traditional navigable waters, and collectively even a small percentage of all discharges can impair navigability. An inability to control discharges into non-navigable tributaries and adjacent wetlands would thus leave the Clean Water Act with a "gaping hole." *Raich*, 125 S. Ct. at 2209.

The Clean Water Act is also constitutional as regulation of a class of economic activity that in the aggregate substantially affects interstate commerce. Petitioners and their amici do not seriously dispute that the activities regulated by the Clean Water Act, in the aggregate, substantially affect interstate commerce. The polluting activities that are regulated by the Clean Water Act are economic in nature. Point-source discharges are a means to dispose of waste, which is the kind of commercial activity that is subject to regulation under the Commerce Clause.

See, e.g., Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 340 n.3 (1992) (noting that solid waste, even if it has no value, is an "article of commerce"). More specifically, discharging fill material into a wetland — the precise activity that is at issue in these cases — is almost always done for economic reasons. This activity, which literally creates land that can be developed where none was before, is inherently "economic." *See Raich*, 125 S. Ct. at 2211 (noting that "economics" means "the production, distribution, and consumption of commodities" (emphasis added) (quotation marks and citations omitted)). The activity also has direct economic effect in terms of downstream flooding and water-quality impairment. Tellingly, virtually every reported decision involving the discharge of fill material, including both *Rapanos* and *Carabell* themselves, has involved large-scale commercial development — construction of a residential subdivision, an industrial building, or public works.[23]

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23. *See, e.g., SWANCC*, 531 U.S. at 163 (construction of a disposal site for baled nonhazardous solid waste); *Riverside Bayview*, 474 U.S. at 124 (construction of residential housing development); *Baccarat Fremont Developers, LLC v. U.S. Army Corp of Eng'rs*, 425 F.3d 1150, 1152 (9th Cir. 2005) (construction of a sixbuilding office, research, and manufacturing facility); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1118 (9th Cir. 2005) (construction of an "upscale gated residential community" containing 794 single-family houses); *United States v. Deaton*, 209 F.3d 331, 333 (4th Cir. 2000) (construction of residential housing development); *Mich. Peat v. U.S. EPA*, 175 F.3d 422, 425 (6th Cir. 1999) (peat mining); *Hill v. Boy*, 144 F.3d 1446, 1448 (11th Cir. 1998) (construction of earthen dam and 650 acre reservoir); *United States v. Wilson*, 133 F.3d 251, 254 (4th Cir. 1997) (construction of planned unit development project serving 80,000 residents); *United States v. Brace*, 41 F.3d 117, 120 (3d Cir. 1994) (commercial farming operation); *Hoffman Homes, Inc. v. U.S. EPA*, 999 F.2d 256, 257-58 (7th Cir. 1993) (residential subdivision); *United States v. Pozsgai*, 999 F.2d 719, 722 (3d Cir. 1993) (construction of commercial truck repair garage); *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 42 (D.C. Cir. 1987) (construction of hydroelectric facility); *Friends of the Earth v. Hintz*, 800 F.2d 822, 824 (9th Cir. 1986) (sawmill logging complex).

That economic aspect sets this case apart from *Lopez* and *Morrison*, the only recent cases striking down federal legislation on Commerce Clause grounds. The regulated activities in those cases — possession of a gun in a school zone and gender-motivated violence — were in no way economic in at least the vast majority of circumstances. *See Lopez*, 514 U.S. at 561; *United States v. Morrison*, 529 U.S. 598, 613 (2000). Whatever motives someone might have for wandering by a school while carrying a gun or for committing a brutal act of violence against a fellow human being, those motives are unlikely to include profit. Nor are the activities at issue in *Lopez* and *Morrison* closely associated with any traditional economic activities like manufacturing or construction. The polluting activities covered by the Clean Water Act, by contrast, are almost always directly tied to traditional economic activity. They are undertaken precisely because of the value that they provide, either by saving on the costs of storage and disposal or by enabling new uses of property. They thus fall within the core of activities that can be regulated under the Commerce Clause.

CONCLUSION

The judgments of the Court of Appeals should be affirmed.

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APPENDIX

Navigable Water Within Each Continental U.S. State With a Portion of the River or Lake in One or More Other States[1]

State	Navigable Water	States with Upstream or Border Portions	Notes
AL	Chattahoochee River	GA	1
AZ	Colorado River	CO, UT, NV, CA	1
AR	Arkansas River	CO, KS, OK	1
CA	Colorado River	CO, UT, AZ, NV	1
CO	Navajo Reservoir (San Juan River)	NM	2,3
CT	Connecticut River	NH, MA, VT	1
DC	Potomac River	WV, VA, MD	1
DE	Delaware River	NY, PA, NJ	1
FL	Apalachicola River	GA	1
GA	Savannah River	SC	1
ID	Snake River	WY, OR, WA	1
IL	Lake Michigan	MI, WI, IN	1

[1]This table lists only one water body for each State, although most States have many such water bodies. For purposes of this appendix, the District of Columbia is treated as a State.

State	Navigable Water	States with Upstream or Border Portions	Notes
IN	Lake Michigan	MI, WI, IL	1
IA	Missouri River	MT, ND, SD, NE	1
KS	Missouri River	MT, ND, SD, NE, IA, MO	1
KY	Mississippi River	MN, WI, IA, IL, MO, TN	1
LA	Mississippi River	MN, WI, IA, IL, MO, KY, TN, AR, MS	1
ME	Piscataqua River	NH	1
MD	Potomac River	WV, VA, DC	1
MA	Connecticut River	NH, VT	1
MI	Lake Michigan	IN, WI, IL	1
MN	Mississippi River	WI	1
MS	Mississippi River	MN, WI, IA, IL, MO, KY, TN, AR, LA	1
MO	Missouri River	MT, ND, SD, NE, IA, KS	1
MT	Yellowstone River	WY	1
NE	Missouri River	MT, ND, SD, IA, MO	1

State	Navigable Water	States with Upstream or Border Portions	Notes
NV	Colorado River	CO, UT, AZ	2
NH	Piscataqua River	ME	1
NJ	Delaware River	NY, PA, DE	1
NM	Navajo Reservoir (San Juan River)	CO	2,3
NY	Delaware River	PA	1
NC	Roanoke River	VA	1
ND	Missouri River	MT	1
OH	Ohio River	PA, WV, KY	1
OK	Arkansas River	CO, KS	1
OR	Snake River	WY, ID	1
PA	Delaware River	NY, NJ	1
RI	Mount Hope Bay	MA	1
SC	Savannah River	GA	1
SD	Missouri River	MT, ND, NE	1
TN	Mississippi River	MN, WI, IA, IL, MO, KY, AR	1
TX	Rio Grande	CO, NM	1
UT	Green River	WY, CO	2,4

State	Navigable Water	States with Upstream or Border Portions	Notes
VT	Lake Champlain	NY	5
VA	Potomac River	WV, MD, DC	1
WA	Columbia River	OR	1
WV	Ohio River	PA, OH	1
WI	Mississippi River	MN, IA	1
WY	Green River (Flaming Gorge Reservoir)	UT	2

Notes

1. U.S. Army Corps of Engineers, *Bridges Over the Navigable Waters of the United States* (1961).

2. *Comments of the Western Water Alliance to the U.S. Environmental Protection Agency*, Docket ID OW-2002-0050, April 16, 2003.

3. *Wreyford v. Arnold*, 477 P.2d 332 (N.M. 1970).

4. *United States v. Utah*, 283 U.S. 801 (1931).

5. U.S. Army Corps of Engineers, *Navigation in Vermont*, http://www.nae.usace.army.mil/water/navigation2.asp?mystate=VT (accessed January 11, 2006).